STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

McLAREN HEALTH CARE CORP, et al,

Plaintiffs/Counter-Defendants,

v

Case No. 2013-137031-CB
Hon. Wendy Potts

THE DETROIT MEDICAL CENTER,

Defendant/Counter-Plaintiff.
_____/

OPINION AND ORDER RE: DEFENDANT'S MOTION FOR SUMMARY DISPOSITION ON FIRST AMENDED COMPLAINT

At a session of Court
Held in Pontiac, Michigan
On
JAN 30 2015

This complex dispute is before the Court on Defendant The Detroit Medical Center (DMC)'s second dispositive motion. The DMC's first motion sought dismissal of the original complaint of Plaintiffs McLaren Health Care Corporation, Barbara Ann Karmanos Cancer Institute, and Barbara Ann Karmanos Cancer Hospital d/b/a Karmanos Cancer Center. The Court granted the motion in part by dismissing Plaintiffs' claims that Section 6 of the Affiliation Agreement between the DMC and the Karmanos entities violated the Michigan Antitrust Reform Act (MARA). Plaintiffs alleged in their original complaint that Section 6, which barred Karmanos from affiliating with other hospitals without the DMC's consent, was an unreasonable restrictive covenant. The Court rejected Plaintiffs' theory because Section 6 is not a noncompetition agreement, however, the Court allowed Plaintiffs to amend to state an anti-trust claim. Plaintiffs sought leave to appeal this decision, which the Court of Appeals denied.

Plaintiffs filed an application for leave with the Michigan Supreme Court, which has yet to rule on it. In the meantime, Plaintiffs amended their complaint to state three claims that Section 6 is an illegal restraint of trade and monopoly in violation of MARA (Counts I, III and V). Plaintiffs also asserted new theories including requests for declaratory relief regarding the parties' agreement (Counts II and IV), as well as claims alleging intentional infliction of emotional harm (Count VI) and unfair competition (Count VII).

The DMC asks the Court to dismiss Plaintiffs' amended complaint under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The DMC first asserts that Plaintiffs' Counts I, III and V fail to allege the elements of MARA antitrust claims. However, review of these Counts and the factual allegations in the complaint shows that Plaintiffs, in fact, alleged all of the necessary elements of the claims and many detailed factual allegations to support the claims. Contrary to the DMC's position, an antitrust claim does not have to be pleaded with specificity and provable accuracy. Instead, Plaintiffs need only plead sufficient plausible facts that, if proven, would take the claims out of the realm of speculation. *Bell Atlantic Corp v Twombly*, 550 US 544, 556 (2007). Whether the factual allegations are improbable or unlikely to be proven is not a proper consideration on a dispositive motion at the pleading stage. *Id.* To the extent that the DMC disputes the accuracy or validity of Plaintiffs' allegations, that is a factual issue to be resolved on a (C)(10) motion or at trial. Because Plaintiffs have alleged all of the necessary elements of their claims and sufficient factual allegations to support those claims, the Court will not dismiss the claims on this ground.

The DMC also argues that Plaintiffs' Count II fails to state a valid claim that the DMC unreasonably withheld its consent for Karmanos to affiliate with McLaren. Article 6 of the Affiliation Agreement bars Karmanos from affiliating with other hospitals or health systems

without the DMC's consent, and further states that the DMC's consent must not be "unreasonably denied or delayed." The DMC asserts that its denial of consent was reasonable, citing several factual circumstances that it believes supports its decision, such as Plaintiffs unwillingness to give the DMC a copy of the agreement between McLaren and Karmanos. However, because this motion is brought under (C)(8) only, the Court's review is limited to the sufficiency of the pleadings and it must accept Plaintiffs' well-pleaded factual allegations as true. *Maiden*, *supra* at 119. Plaintiffs allege that Karmanos sought the DMC's consent to affiliation with McLaren and the DMC unreasonably withheld its consent. These claims are sufficient to allege a breach of the consent provision of Article 6, and it is premature for the Court to decide whether there is factual support for Plaintiffs' claim. The DMC's request to dismiss Count II on this ground is denied.

The DMC next asserts that Plaintiffs' Count IV and V fail to allege that Plaintiffs are relieved of complying with the Affiliation Agreement because the DMC was the first to materially breach the agreement. A party who breaches a contract may not maintain an action against the other contracting party for a subsequent breach or failure to perform, provided the initial breach is material and substantial. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). Plaintiffs contend, and the Court agrees, that whether the DMC was the first to materially and substantially breach the agreement is a question of fact that cannot be resolved on a (C)(8) motion. Because Plaintiffs alleged all of the essential elements of their claim that the DMC was the first to breach, the DMC is not entitled to dismissal of Counts IV and V on this ground.

The DMC further asserts, and the Court agrees, that Plaintiffs' Count VI alleging intentional infliction of economic harm fails because our courts have not recognized this claim.

Plaintiffs cite only one Michigan case that mentions this purported tort, *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361; 354 NW2d 341 (1984), but review of that case shows that the tort is referenced only in passing and the court in *Trepel* did not analyze the merits of the claim. No other Michigan decision, either published or unpublished, recognizes a claim for intentional infliction of economic harm. Plaintiffs urge the Court to adopt this new theory, claiming that it is grounded in the public health code. However, the decision to recognize a whole new common-law tort claim rests with the Michigan Supreme Court, not this Court. See Sizemore v Smock, 430 Mich 283, 292; 422 NW2d 666 (1988). Because Plaintiffs' Count VI fails to allege a cognizable claim under Michigan law, the DMC is entitled to dismissal of that claim.

As its final argument, the DMC asserts that Plaintiffs' Count VII alleging unfair competition fails because it is based on the DMC's alleged breach of its contractual obligations and Plaintiffs have not alleged any duty the DMC owed Plaintiffs independent of contractual duties. In order to assert a tort claim arising from a contractual relationship, Plaintiff must allege that Defendants breached a duty distinct from the breach of contractual duties. *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 83; 559 NW2d 647 (1997). Plaintiffs' Count VII contains few specific factual allegations regarding the alleged unfair competition. The sole factual allegation relates to the DMC's use of the Karmanos brand in connection with a DMC facility in Commerce Township. The terms of the DMC's use of the Karmanos name is spelled out in detail in the Affiliation Agreement, and thus any duty the DMC has to Karmanos in this regard arises from that agreement. Plaintiffs cite no common-law basis for a duty the DMC owes Karmanos regarding the use of its brand.

Even if Plaintiffs could cite a common-law source of the DMC's duties, Count VII fails to allege the necessary elements of an unfair competition claim. To assert a claim for unfair competition under Michigan law, Plaintiffs must allege that the DMC used a competitor's name, symbols, or devices or offered the competitor's goods or services as its own for the purpose of deceiving the public and to obtain the benefits properly belonging to the competitor. See *Carbonated Beverages, Inc v Wisko*, 297 Mich 80, 83; 297 NW 79 (1941). Although Plaintiffs allege that the DMC used the Karmanos name for the purpose of deceiving the public, there is no allegation that the DMC and Karmanos were competitors. Although the DMC and McLaren could be competitors, this fact is not alleged in Count VII and, even if it was, there is no allegation that the DMC used McLaren's brand or passed off its good or services as its own. Because Plaintiffs fail to allege an unfair competition claim as a matter of law, the DMC is entitled to summary disposition of that claim.

For all of these reasons, the Court grants the DMC's motion as to Plaintiffs' Count VI alleging intentional infliction of economic harm and Count VII alleging unfair competition. In all other respects, summary disposition is denied.

IT IS SO ORDERED.

Dated: JAN 30 2015

JH Hon. Wendy Potts